No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION

Kenneth P. Casey
131 W. Wilson Street,
Suite 100
Madison, Wisconsin 53707
(608) 267-0311
Counsel of Record

Lynn S. Adelman
Pamela Moorshead
Adelman, Adelman & Murray, S.C.
308 East Juneau
Milwaukee, Wisconsin 53202
(414) 225-2925

Attorneys for Respondent

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QUESTION PRESENTED

Prior to its amendment, did Wisconsin Statute §939.645 (1989-90), violate the First and Fourteenth Amendments to the U.S. Constitution?

STATEMENT OF THE CASE

Wisconsin's Statement of the Case is factually accurate but fails to note that the statute involved has been amended.

Just over one month before the Wisconsin Supreme Court rendered its decision in this case, the Statute under which Todd Mitchell had been prosecuted was amended. 1991 Wisconsin Act 291[1] (effective May 13, 1992). The amendment inserted the words "in whole or in part" before the phrase "because of" so that the hate crimes enhancer statute, as amended, increases punishment for crimes whenever the actor selects the victim of the crime "in whole or in part because of" the actor's belief or perception of the victim's race or other specified characteristics whether or not that belief or perception was correct. The case had been briefed before enactment of this amendment, and the Wisconsin Supreme Court made only passing reference to the amendment.

As best we understand the legal conclusions and opinions expressed in footnote 1 of Wisconsin's Statement of the Case, we do not agree with them. Footnote 1 in Wisconsin's Statement of the Case notes that, under subsection (2)(b) of

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[1]The Act amending the statute reads, in pertinent part:

> SECTION 1. 939.645(1)(b) of the statutes is amended to read:
> 939.645(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

the Wisconsin hate crimes penalty enhancer, Class A misdemeanors become felonies. The state then opines that "the language of this subsection leaves some doubt as to whether this change in status is automatic" and that this portion of the statute has no relevance to Mitchell. Neither the precise nature of the state's doubts nor its meaning of "automatic" is clear. But the state cannot seriously dispute that a Class A misdemeanor becomes a felony as soon as the prosecutor decides to charge that misdemeanor under the hate crimes enhancement statute.

The effect of subsection (2)(b) is to convert any Class A misdemeanor to a felony. Under Wisconsin criminal procedure, a defendant charged with a felony must be given a preliminary examination unless waived by the defendant, Wis. Stat. §971.02 (1989-90), and the judge presiding at the defendant's very first appearance in court is required to inform the defendant of his right to a preliminary examination, Wis. Stat. §970.02(1)(c) (1989-90). A plea cannot be accepted in any case in which a preliminary examination is required until the defendant has been bound over following a preliminary or waiver thereof. Wis. Stat. §970.03(3) (1989-90). It follows that a Wisconsin Prosecutor must choose at the commencement of prosecution whether a Class A Misdemeanor is to be charged under the hate crime enhancement statute and thereby concerted to a felony. In this sense, this change in status is automatic as soon as the district attorney starts a prosecution.

SUMMARY OF ARGUMENT

This case presents no issue that has not already definitively resolved by this Court in *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538 (1992) That case required the same result reached by the Wisconsin Supreme Court. Moreover, the 1992 amendment to Wisconsin's hate crimes enhancer statute raises a question about the meaning of the phrase "because of" in the original statute.

Accepting the Mitchell case will require federal constitutional analysis of the overbreadth of the hate crimes enhancement statute. The breadth of that statute turns, in large part, on the meaning given to the phrase "because of" when a criminal selects a victim "because of" the race of other specified characteristics of the victim. The recent amendment to the Wisconsin Statute suggests that the original intent of the legislature was to read the phrase "because of" in its broadest sense as "in whole or in part because of" so that the original statute is substantially overbroad. If on the other hand the amendment represented a substantial broadening of the meaning of the phrase "because of" then this Court is being asked to review a now defunct statute with little public importance in Wisconsin or elsewhere. Lacking any authoritative interpretation of the phrase "because of" from any Wisconsin court, this Court cannot

authoritatively resolve the meaning of this phrase in order to analyze the breadth of the statute.

ARGUMENT

I. THE HATE PENALTY ENHANCER STATUTE PUNISHES THOUGHT AND EXPRESSION BASED ON ITS CONTENT IN VIOLATION OF THE FIRST AMENDMENT AND THIS COURT'S DECISION IN R.A.V. *v.* CITY OF ST. PAUL.

In *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S.___, 112 S. Ct. 2538 (1992), this Court held that government may not regulate speech based on content even where the speech falls into an otherwise unprotected category such as fighting words. The First Amendment prohibits government from picking and choosing among those words, criminalizing some but not others, based on special hostility toward the offensive viewpoint they express. Wis. Stat. §939.645 violates the First Amendment and this Court's decision in *R.A.V.* by punishing thought and expression based on its bigoted content. The Wisconsin Supreme Court correctly concluded that, "[t]he hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." *State v. Mitchell*, 169 Wis. 2d 153, 163, 485 N.W.2d 807, 811 (1992). The statute separately criminalizes and punishes that offensive thought. Any conduct involved in a prosecution under the penalty enhancer is already punishable under Wisconsin's criminal code. Proof of that conduct alone is insufficient to invoke the penalty enhancer. Nor is the penalty enhancer invoked when that

conduct is particularly heinous or when the injury to the victim is particularly severe. Rather, the penalty enhancer operates to add an additional penalty when the offender has engaged in that conduct for one of the prohibited reasons. The offender's bigoted ideology and bigoted thoughts about his victim are the only bases for substantial additional penalties.

Petitioner argues that the statute punishes the "criminal conduct" involved in the "victim selection process" Petition for Certiorari at p. 15. This argument, however, ignores the authoritative construction which the Wisconsin Supreme Court has already given to the words, "intentionally selects" and "because of" in the Statute. *Mitchell*, 169 Wis. 2d at 164-168, 485 N.W.2d at 812-813, (A.8-11). Although the Statute refers to intentional selection of a victim, the *Mitchell* Court concluded that it is the "because of" aspect of the selection that the statute punishes. 169 Wis. 2d at 164, 485 N.W.2d at 812, (A.8). The *Mitchell* court construed the statute to be, "expressly aimed at the bigoted bias of the actor." 169 Wis. 2d at 166, 485 N.W.2d at 813, (A.11). This Court is bound by the construction given to §939.645 by the Wisconsin Supreme Court. *R.A.V.*, 112 S. Ct. at 2542, citing *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339, 106 S. Ct. 2968, 2975-2976 (1986); *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S. Ct. 3348, 3361, n. 24 (1982); *Terminello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 895-896 (1949). Any argument that the

statute regulates criminal conduct is improper since the statute as authoritatively construed by the State Supreme Court is directed, not at conduct, but at motive.

Petitioner seeks to justify this separate punishment of offensive motive by analogizing to the varying punishments for different degrees of homicide based upon intent. The comparison breaks down, however, because it ignores the fundamental difference between motive and intent. Criminal jurisprudence has long recognized this distinction. Unlike intent, "motive is not relevant on the substantive side of the criminal law. W. LaFave and A. Scott, Criminal Law, §3.6 at 227 (2d Ed. 1986). Intent determines an actor's culpability based upon his volition. Motive is the actor's underlying reason for acting. In the homicide example used by Petitioner, intent refers to whether the homicide was inadvertent, reckless or the result of a conscious choice by the actor to kill someone. Obviously, manslaughter is completely different conduct than cold blooded murder. Therefore, differences in punishment based upon different levels of volition are appropriate. On the other hand, motive in the homicide example would be nothing more than the thoughts and belief systems that prompted the offender to act.

The thoughts and belief systems of the offender are protected by the First Amendment. That the offender may have violated a criminal law "because of" these thoughts does not

somehow deprive the thoughts of their First Amendment protection. If it were otherwise, the State of Texas could have escaped this Court's decision in *Texas v. Johnson*, 491 U.S. 397, 109S. Ct. 2533, 105 L.Ed.2d 342 (1989) by prohibiting public burning and then enacting a penalty enhancer that would apply whenever a person commits the offense of public burning "because of" his opposition to the policies of the government. The constitution would not allow this extra punishment for the offender's unacceptable thought. Yet this is precisely the effect of Wisconsin's hate crimes law.

The Wisconsin Supreme Court correctly held that in addition to violating the First Amendment directly by punishing offensive thought, the statute also, "violates the First Amendment indirectly by chilling free speech." *Mitchell*, 169 Wis. 2d at 163, 485 N.W.2d at 811, (A.7). The penalty enhancer does not expressly punish bigoted speech or association. However, enforcement of the statute almost invariably relies on the offender's speech and association as the only evidence of the bad motive the statute seeks to punish. The distinction between the use of the offender's speech and associations as the only evidence of this motive, and punishment of the words and associations themselves is so fine as to be non-existent. As the Wisconsin Supreme Court noted in Mitchell:

> … there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if

> A strikes B in the face he commits a criminal battery. However, should A add a word such a "nigger," "honkey," "jew," "mick," kraut," spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone--but for using the spoken word. …
>
> 169 Wis.2d at 174, 485 N.W.2d at 816,(A.18).

When the offender's motive is evidenced only by words, it is the words themselves that are punished.

Moreover, the penalty enhancer does not require a contemporaneous expression of bigotry. Any time someone is charged with a crime he is subject to the penalty enhancer if the state can prove that he had bigoted views and was acting upon them at the time of the offense. In addition to any words the defendant may have spoken while committing the offense, all of his remarks on prior occasions, the books he has read, the lectures he has attended, the people he has associated with, or the organizations to which he belongs can all be introduced as evidence that his selection of his victim was motivated by bigotry. *See e.g. Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991) (arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults.")

Thus, the effect of the statute is to punish bigoted speech and association, and the bigoted thought manifested thereby, based on its content. In *R.A.V.*, this Court held that the St. Paul ordinance at issue violated the First Amendment when it "proscribed fighting words of whatever

manner that communicate messages of racial, gender or religious intolerance." 112 S. Ct. at 2549. The Court observed that, "[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." 112. S.Ct. at 2549. Wisconsin's penalty enhancer goes even further than the ordinance at issue in *R.A.V.* Not only does the Wisconsin law enhance the penalties for thought/speech which communicates messages of intolerance, it does so regardless of whether the speech can be characterized as fighting words.

It is immaterial that Wisconsin's statute punishes this speech and the underlying viewpoint only when it is linked to criminal conduct. In *R.A.V.* the message of the defendant was inextricably linked to criminal conduct. In that case, the defendant's act of burning a cross on a black family's lawn could have legitimately been prosecuted under any one of a number of content neutral criminal statutes. *R.A.V.* 112 S.Ct. at 2541. In *R.A.V.*, this Court held that while the defendant could have been punished for his criminal conduct under content-neutral laws, he could not be chosen for special punishment based upon the content of his message. 112 S.Ct. at 2541, 2549. Similarly, the State of Wisconsin could prosecute Todd Mitchell under content-neutral criminal statutes. However, the State may not separately punish Todd Mitchell's statements or their underlying thoughts or attitudes, based on their offensive content. The expressive element does not shield the offender from prosecution for his

criminal conduct. However, the criminal conduct does not deprive the offender's expression or beliefs of First Amendment protection.

In fact, Wisconsin's penalty enhancer reaches situations in which the underlying offense openly involves speech For example, in Wisconsin, a prosecution for disorderly conduct can be based upon fighting words alone without any accompanying conduct. An offender need not burn a cross or engage in any conduct other than the uttering of abusive or profane fighting words to be convicted of disorderly conduct.[2] Disorderly conduct is ordinarily punishable by a maximum fine of $1,000 and a maximum period of incarceration of 90 days. Wis. Stats. §947.01 (1989-90), §939.51 (1989-90). The penalty enhancer automatically bumps the penalty up to a maximum fine of $10,000 and a minimum period of incarceration of one year if the offender's fighting words contain any of the prohibited bigoted content. Similarly, Defamation, under Wis. Stat. § 942.01 or Giving False Information for Publication under Wis. Stat. § 942.03, which are each normally "Class A" misdemeanors, become felonies when the relevant speech contains any of the outlawed bigoted

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[2]Wisconsin's Disorderly Conduct Statute, §947.01, provides: **Disorderly Conduct.** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The Statute on its face reaches speech that is "profane," "abusive," or "unreasonably loud" if it spoken under circumstances such that it would, "tend to cause or provoke a disturbance." The Wisconsin Supreme Court held that this statute is not overbroad. State of Wisconsin v. Zwicker, 41 Wis. 2d 497, 508-511, 164 N.W. 2d 5121, 518-519 (1969). The Court relied heavily on Chaplinsky v. New Hampshire, 315 U. S. 568, 62 S. Ct. 766 (1942), and appeared to limit the reach of the statute to fighting words. Zwicker, 41 Wis. 2d at 510, 164 N.W. 2d at 518-519.

content. These two examples illustrate dramatically that §939.645 exhibits the very same defect this court condemned in *R.A.V.*. It discriminates among otherwise unprotected speech based on content, imposing special punishment upon speakers who speak on the disfavored topics.

Petitioner seeks to distinguish *R.A.V.* by claiming that Wisconsin's penalty enhancer does not single out speech based upon content but, rather, singles out crimes that are directed at certain groups. However, §939.645 does not protect oppressed groups any more that did the St. Paul ordinance condemned in R.A.V. The only relevant consideration under the statute is the bigoted motive of the offender not the victim's membership in a protected group. This is starkly illustrated in the instant case where the defendant is black and the victim white. The Statute does not protect groups. It proscribes "messages of `bias-motivated' hatred . . ." *R.A.V.*, 112 S. Ct at 2548.

Petitioner seeks to justify the penalty enhancer based upon the special harm caused by the bias motivated crimes, asserting that such crimes affect not only the immediate victim, but all members of the targeted group, Petition for Certiorari at p.16. In *R.A.V.* St. Paul's advanced this identical argument. The Court rejected this argument, observing:

> What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing

> other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.
>
> R.A.V., 112 S. Ct. at 2548. (citation omitted).

If the speech that is proscribed by Wisconsin's penalty enhancer results in unique harm, it is because of the content of the message. The State cannot evade the First Amendment by simply declaring that its punishment of speech and thought is based not on its offensive content, but on the special harm resulting from its offensive content.

Petitioner also attempts to fit the penalty enhancer into the "secondary effects" exception outlined by this Court in *R.A.V.*, arguing the Wisconsin statute targets the "particular harm" caused by bias-motivated crime. This argument fails because the "particular harm" referred to by the state amounts to no more than the emotive impact of the offender's bigotry. In *R.A.V.* the Court emphasized that, "[t]he emotive impact of the speech on its audience is not a secondary effect." *R.A.V.*, 112 S. Ct. at 2549 (citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L. Ed.2d 29 (1986)).

Petitioner alternatively asserts that even if the penalty enhancer is a content based regulation of speech, it is permissible because it serves the State's compelling interest in eradicating discrimination against its citizens,

Petition for Certiorari at p.15 n.7. In *R.A.V.* the City of St. Paul advanced a similar argument. The Court recognized that St. Paul's interest in ensuring the basic human rights of its citizens was undoubtedly compelling and that the ordinance could be said to serve that interest. However, the Court cautioned that:

> the "danger of censorship" presented by a facially content-based statute requires that weapon be employed only where it is "necessary to serve the asserted [compelling] interest."
>
> *R.A.V.*, 112 S. Ct. at 2549. (citations omitted).

The Court held that St. Paul's ordinance was not reasonably necessary to achieve St. Paul's interests because the City could have achieved its desired goal with a content neutral ordinance. The Court observed:

> The only interest distinctively served by the content limitation is that of displaying the City Council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.
>
> *R.A.V.*, 112 S. Ct. at 2550. (citations omitted).

In the instant case, as in *R.A.V.*, content-neutral alternatives are available that would achieve the State's compelling interest. For example, the State could enact a penalty enhancer that increases the penalty for crimes that are committed "with specific intent to create terror within a

community." Such an alternative law would serve the State's interest without any reference to the offender's motive or the content of his speech.

As in *R.A.V.*, the availability of adequate content neutral alternatives to Wisconsin's penalty enhancer, "undercuts significantly" any defense of such a statute. *R.A.V.*, 112 S. Ct. at 2550 (citing *Boos v. Barry*, 485 U.S. at 329, 108 S. Ct. at 1168)). As in *R.A.V.* the only interest served by the content-based regulation that would not be served by the content-neutral alternatives is the State's interest in expressing "special hostility towards the particular biases thus singled out." The First Amendment prohibits the State from expressing its hostility toward particular offensive ideas by criminalizing them or their expression.

II. THE WISCONSIN SUPREME COURT'S DECISION IN *MITCHELL* IS CONSISTENT WITH THIS COURT'S DECISION IN *DAWSON v. DELAWARE*.

Petitioner argues that this Court in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), indicated that evidence of racist beliefs may be properly considered at sentencing, Petition for Certiorari at p.12. Petitioner reasons that if racist motive can be considered at sentencing, then it is an appropriate basis for a penalty enhancer.

However, in *Dawson*, this Court actually rejected evidence of racism as proof of an aggravating factor. The

Court did not approve "hatred, bias or prejudice" as themselves constituting aggravating factors. Rather, the Court simply stated that the, "Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing," when that evidence, "might be relevant to proving other aggravating circumstances." Id. at 1097, 1098 (emphasis added).

In *Dawson*, the Court relied on *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). In *Barclay*, the four Justices referred to the fact that the sentencing judge had "discussed" the defendant's racial motive, not that the judge "relied" on racial motive as an aggravating factor. In *Barclay* the Court found that the consideration of this evidence was permissible, not because the defendant's racist motive itself constituted an aggravating factor, but because the evidence was relevant to a content-neutral statutory aggravating factor, i.e., that the offense was committed in an "especially heinous, atrocious or cruel" manner. *Barclay*, 463 U.S. at 949.

This Court's decisions in *Dawson* and *Barclay* make it clear that while evidence of a defendant's bigotry may be introduced as evidence of a content-neutral sentencing factor, this must be done with the utmost caution and only under limited circumstances. Under *Dawson* and *Barclay*, evidence of bigotry may, like any other evidence, be introduced to prove a content-neutral aggravating factor,

despite the fact that the bigotry itself is protected by the First Amendment. However, these cases lend no support to the novel proposition that a defendant's bigoted motive itself can be punished.

Moreover, both *Dawson* and *Barclay* involved factors that could only be considered once the appropriate sentencing range had been fixed by the legislature. In contrast, Wisconsin's penalty enhancer adds an additional penalty beyond the maximum penalty fixed by the legislature for the underlying criminal conduct. In many cases, the penalty enhancer operates to convert a misdemeanor to a felony. Nothing in *Dawson* or *Barclay* supports the proposition that an offender's bigoted motive may, all alone, be used to automatically convert a misdemeanor to a felony, subjecting the offender to several years in prison and all of the other consequences a felony conviction entails[3].

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3 By converting a Class A misdemeanor to a felony, the statute does far more than enlarge the discretion of the sentencing judge. In Wisconsin, mere conviction of a felony carries substantial collateral consequences whatever sentence is imposed. A felon may not vote until his civil rights are restored upon completion of the sentence. Wis. Const. A. XIII §2; Wis. Stat. §304.078; having been convicted of an "infamous crime" he is probably not eligible to hold "any office of trust, profit or honor" in the state unless given a complete pardon. Wis. Const. A. XIII §3, 65 Opinions of the Attorney General 292. It is a crime under both state and federal law for a felon to possess a firearm. Wis. Stat. § 941.29, 18 U.S.C. § 922(g)(1). Felons are also denied certain licenses, e.g. Wis. Stat. §125.04(5)(b) prohibiting any license or permit relating to alcohol beverages to a person convicted of a felony the person has been duly pardoned.

III. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE 1992 AMENDMENT TO THE HATE CRIMES ENHANCEMENT LAW RAISES AN IMPORTANT QUESTION AS TO THE MEANING OF THE PHRASE "BECAUSE OF" IN THE ORIGINAL STATUTE WHICH QUESTION HAS NEVER BEEN ADDRESSED BY ANY WISCONSIN COURT.

A. THE ADDITION OF THE WORDS "IN WHOLE OR IN PART" HIGHLIGHTS THE AMBIGUITY OF THE PHRASE "BECAUSE OF" IN THE ORIGINAL STATUTE.

The Wisconsin Statute enhances the penalty for crimes when the victim is selected "because of" certain characteristics. The term "because" may be interpreted in a number of ways. It could describe a "but for" notion of causality. It could mean that the specified characteristics were a "substantial factor" in the selection. Or, it could mean that the specified characteristics played any part at all in the selection no matter how small. The 1992 amendment which added the words "in whole or in part" to the phrase "because of" highlighted this original ambiguity. Either the Wisconsin legislature meant to clarify its original meaning or to expand that meaning.

But no Wisconsin court has interpreted this phrase in the hate crimes enhancement statute. Mitchell did not question the interpretation of these words in his vagueness challenge focusing instead on the word "race" and the phrase "intentionally selects" *State v. Mitchell*, 163 Wis.2d 652,659, 473 N.W.2d 1,4 (Ct. App. 1991), (A.57-58). The phrase "because of" must either be interpreted with the expansive causality notion expressed clearly in the 1992

amendment or the original hate crimes enhancement statute is now a dead letter in Wisconsin.

If the Court accepts this case, it must confront the question of the statute's overbreadth. That issue cannot be approached without analyzing the breadth and sweep of the statute. Since the breadth of the statute depends vitally upon the interpretation of the words "because of," this Court will be unable to analyze the overbreadth issue without speculating how Wisconsin courts will interpret this phrase.

B. IF ADDITION OF THE WORDS "IN WHOLE OR IN PART" TO THE PENALTY ENHANCEMENT STATUTE REFLECTS THE WISCONSIN LEGISLATURE'S CLARIFICATION OF ITS ORIGINAL INTENT, THEN THE STATUTE SUFFERS FROM SUBSTANTIAL OVERBREADTH.

The Wisconsin Supreme Court has held that, when a former statute is amended, the amendment is entitled to some weight as an aid to the court in determining legislative intent in the original statute. *McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 427, 312 N.W.2d 37, 43 (1981); *Yanta v. Montgomery Ward & Co.*, 66 Wis.2d 53, 61, 224 N.W.2d 389, 394 (1974); *Milwaukee Fire Fighters Assoc. v. Milwaukee*, 50 Wis.2d 9, 19, 183 N.W.2d 18, 23 (1971). Accordingly, the 1992 amendment to Wisconsin Statute § 939.645 may have merely clarified the original intent of the Wisconsin legislature that the term "because of" should be interpreted expansively as though it read "in whole or in part because of."

Read so expansively, the statute is clearly overbroad. Even if it were constitutionally permissible to enhance punishment for a crime substantially motivated by bias, no compelling state interest is served by enhancing punishment for a crime motivated substantially by other reasons and only incidentally by one of the specified bases. The overly expansive sweep of the statute is then seen clearly in cases of mixed motivation where otherwise protected speech is involved. In a bar fight or argument over a parking space racial or ethnic slurs may regrettably be only too common. In those situations, a simple battery which is a Class A misdemeanor in Wisconsin[4] is raised to a felony even with only partially racial or ethnic motivation.

C. IF THE ADDITION OF THE WORDS "IN WHOLE OR IN PART" EXPAND THE BREADTH OF THE ORIGINAL STATUTE, THEN REVIEW OF THIS CASE HAS LITTLE PUBLIC IMPORTANCE IN WISCONSIN OR ELSEWHERE.

If the 1992 amendment is thought to work a substantial change in the Wisconsin statute, then this Court is being asked to review a now defunct law. We are unaware of any cases now pending under the original unamended hate crimes enhancer statute. It is likely that Todd Mitchell was the last person to be prosecuted under this law before it was amended.

4 Wis. Stat. § 940.19(1).

IV. THE *MITCHELL* DECISION DOES NOT JEOPARDIZE ANTI-DISCRIMINATION LAWS.

Notwithstanding the hyperbole in Wisconsin's Petition, the Mitchell decision does not jeopardize civil anti-discrimination laws. The Wisconsin Supreme court has explicitly disavowed the application of its decision to invalidate any anti-discrimination laws *State v. Mitchell*, 169 Wis.2d at 177-78, 485 N.W.2d at 817, (A.19-20). The Petitioner's claim that *Mitchell* "casts a dark cloud over all anti-discrimination laws in this country" is nothing more than a dispute with the reasoning of the Wisconsin Supreme Court. This is an insufficient reason to invoke the certiorari jurisdiction of this Court.

CONCLUSION

For all the reasons stated above, this court should deny Wisconsin's Petition for a Writ of Certiorari.

Respectfully submitted,

Kenneth P. Casey
131 W. Wilson Street,
Suite 100
Madison, Wisconsin 53707
(608) 267-0311
Counsel of Record

Lynn S. Adelman
Pamela Moorshead
Adelman, Adelman & Murray, S.C.
308 East Juneau
Milwaukee, Wisconsin 53202
(414) 225-2925

Attorneys for Respondent